EV 07-0051-C h/h Morabito v Swager
Judge David F. Hamilton Signed on 6/29/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JAMES MORABITO,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 3:07-cv-00051-DFH-WGH
	)	
DENNIS SWAGER,	)	
DALE PERDUE,	)	
TEAM ENERGY, LLC,	)	
MID-CENTRAL LAND SERVICES, LLC,	)	
AMQUE USA, INC.,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JAMES MORABITO, Plaintiff, v. DENNIS SWAGER, DALE PERDUE, TEAM ENERGY, LLC, MID-CENTRAL LAND SERVICES, LLC, and AMQUE USA, INC., Defendants.	)	CASE NO. 3:07-cv-0051-DFH-WGH

ENTRY ON MOTION TO ENFORCE SETTLEMENT AGREEMENT

Plaintiff James Morabito has moved to enforce what he claims was a settlement agreement with the defendants. The parties' written submissions show clearly that the parties did not reach agreement on at least one of the essential terms of the alleged settlement. The parties reached at most an unenforceable "agreement to agree." Morabito's motion must therefore be denied.

Morabito contracted with defendants Dennis Swager and Dale Perdue to form a joint venture to invest in oil and gas wells in the Canadian province of Quebec. A Canadian company called Junex, Inc. had control of a large area in Quebec for development of oil and gas wells. Swager, Perdue, and Morabito formed a joint venture called AMQUE. AMQUE USA, Inc. is an Indiana

corporation that owns AMQUE, ULC, a Canadian entity. In July 2006, the AMQUE joint venture secured an option on a wide area of land controlled by Junex. The terms of the option required the joint venture to spend $1.2 million by October 2007. Further development would require spending another $10.8 million over the next 21 months to begin drilling operations. Failure to meet the conditions could result in loss of the option.

Morabito alleges in the lawsuit that Swager and Perdue decided to squeeze him out of AMQUE and its Junex deal on the eve of a profitable sale of AMQUE's option rights. Invoking the court's diversity jurisdiction, Morabito has asserted claims for breach of contract, breach of fiduciary duty, unjust enrichment, and corporate waste and misuse of assets. Swager and Perdue have asserted in response that Morabito never invested the promised cash in the business and never produced the contacts or other contributions to the venture that he had promised to provide in lieu of or before he provided cash.

For purposes of Morabito's motion to enforce the alleged settlement, the court can and should stay neutral as to the merits of these different perspectives on the case. Morabito filed his complaint on April 20, 2007. In early May 2007, defendants were negotiating a possible sale of the AMQUE rights, and they had an interest in quickly resolving any disputes with Morabito. On May 3, 2007, Morabito's attorney made the following proposal to defendants' attorney, apparently in response to defendants' proposal for a "walk-away" agreement:

> Jim [Morabito] will relinquish any and all interest in AMQUE, enter into a mutual settlement and release agreement, and dismiss the Complaint in exchange for a cash payment of $800,000 plus a 1/2% override. We can close on that deal as quickly as tomorrow. This offer remains open until 5:00 p.m. (Eastern), Friday, May 4, 2007, for acceptance in writing.

Pl. Ex. A.

Defendants' attorney responded the same day:

> In your e-mail to me earlier today you extended an offer on behalf of your client, Jim Morabito, pursuant to which Jim offered to "relinquish any and all interest in AMQUE, enter into a Mutual Settlement and Release Agreement, and dismiss the Complaint in exchange for a cash payment of $800,000.00 plus a one-half (1/2) percent override." I have been directed and authorized by Team Energy, MidCentral Land, Dennis and Dale to accept the offer and I do hereby accept the same on their behalf.
>
> Please contact me at your convenience to discuss the remaining logistics.

Pl. Ex. B.[1]

Over the next two weeks, the parties and their attorneys exchanged much more elaborate written draft agreements (signed by only one side) but never reached closure on the more elaborate agreement. Each side said the other's final proposal was not acceptable, and negotiations came to an end. On May 31, 2007, Morabito filed the pending motion to enforce what he asserts was a binding settlement agreement formed through the offer and acceptance of May 3, 2007.

[1]Team Energy is controlled by Dennis Swager. Dale Perdue controls Mid-Central Land Services.

Defendants assert there was no agreement on material terms, but only an agreement to agree.[2]

The parties agree that Indiana law governs the issue. A fundamental tenet of contract law is that "a contract is unenforceable if it is so indefinite and vague that the material provisions cannot be ascertained." *Ewing v. Board of Trustees of Pulaski Memorial Hospital*, 486 N.E.2d 1094, 1098 (Ind. App. 1985), quoting *Pepsi-Cola General Bottlers, Inc. v. Woods*, 440 N.E.2d 696, 699 (Ind. App. 1982). Material or essential terms of an agreement must be defined with reasonable certainty for the agreement to be enforceable. *Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 357 (7th Cir. 2001); *Wolvos v. Meyer*, 668 N.E.2d 671, 676 (Ind. 1996); accord, *Brines v. XTRA Corp.*, 304 F.3d 699, 701 (7th Cir. 2002) (applying general contract law under ERISA and finding that employer's promise to develop and implement "an appropriate separation program" was too vague to be legally enforceable). Complete agreement on every detail is not necessarily required: "All that is required is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom." *Wolvos*, 668 N.E.2d at 676, quoting *Johnson v. Sprague*, 614 N.E.2d 585, 588 (Ind. App. 1993). In *Johnson*, for example, the court found an enforceable contract for sale of land where the agreement correctly identified the parties, the real estate, the purchase price, and the closing date. Where the parties have failed to agree on essential terms,

[2]The parties met with Magistrate Judge Hussmann on June 25, 2007 to determine whether settlement might be possible. It was not.

however, an agreement to agree on them later is not enforceable. *Wolvos*, 668 N.E.2d at 674; *Mays*, 255 F.3d at 358-59.

Despite the language of "offer" and "accept" in the parties' May 3rd communications here, the record before the court shows that the parties never reached agreement on at least one essential term of the settlement plaintiff seeks to enforce. Most important, the apparent agreement on the one-half percent "override" royalty did not reflect agreement on the other factor in the formula: one-half percent of what? Without an answer to that question, there was no agreement on the essential contract term of price.

Defendants sent a draft written agreement to Morabito on May 8, 2007, three business days after the supposed agreement. Def. Ex. I. Defendants' draft provided for a one-half percent override royalty measured against any interests the defendants might acquire in an oil and gas lease issued pursuant to "the Junex Licenses or the AMQUE Licenses." ¶ 3(b).

Three days later, on May 11, 2007, Morabito responded with a very different proposal for the override royalty. First, Morabito wanted the override royalty to apply also to any licenses that the defendants might acquire in the next two years "in connection with Gastem, Intragaz, Junex, Petrolia, or Squatex ('Corporate Opportunity Licenses')." Def. Ex. M, ¶ 3(b) (red-lined version). Second, Morabito also proposed expanding the other factor in the royalty formula to include not just

the defendants' interests in the covered leases, but the entire production of the wells ("8/8's" in the language of the business). Defendants assert that the Province of Quebec has an interest in the production of any well, and AMQUE was to have only a partial interest in the remaining portions of the production. Under Morabito's view, an override royalty of one-half percent of total production would approach a royalty of one percent of the defendants' interest in some wells. Which did the parties supposedly agree to? The evidence provides no answer.

Morabito also proposed that his override royalty would apply to Junex Licenses and AMQUE Licenses that defendants might lose and then regain within a five year period. Defendants agreed to a two year period for this "continuity provision," but the parties never reached a meeting of the minds on that issue.[3]

Later that same day, May 11th, defendants objected to Morabito's proposed changes. Negotiations continued for another week and reached an impasse on or about May 18, 2007.

In seeking to enforce the asserted May 3rd agreement, Morabito has failed to come forward with evidence that would allow a trier of fact to find an agreement

[3]Morabito's proposed draft added some other new terms, including a demand for an additional $7,491 in cash and an agreement by defendants to indemnify him with respect to obligations arising from the AMQUE joint venture. Those additional demands appear not to have been included in, let alone essential terms of, the claimed May 3rd agreement, but Morabito's attempt to introduce them certainly seems to have made the negotiations more difficult.

as to the essential term of the override royalty: one-half percent of what? The evidence simply gives the court no way to answer that question. The negotiations that occurred after May 3rd show that the parties had very different understandings of the answer to that essential question. They differed with respect to both (a) which leases would be covered, and (b) whether the override would be based on 100 percent of the production or only the fraction in which defendants would have an interest.

To support his motion, Morabito has submitted an affidavit saying that he remains "committed to the settlement agreement," and he is "prepared to discuss, in good faith, the two issues remaining," *i.e.*, the scope of the override royalty and the length of the so-called "continuity provision." Morabito Aff. ¶ 9. What Morabito has not provided in the affidavit is evidence of any objective manifestations of intent by him or by defendants that shows they reached agreement on those key points, and especially on the scope of the override royalty, on or before May 3rd. Nor has he offered evidence of usages of trade or other objective grounds for determining the scope of the override royalty. In other words, Morabito has not offered evidence that the parties actually agreed on those key terms; he states only that he is prepared to continue negotiations in good faith. That is not an agreement.

What happened here is that the later negotiations showed a key ambiguity in the May 3rd "offer" and "acceptance." There was no agreement on the question,

one-half percent of what? The ambiguity is comparable to an agreement on price where one party thought the price was expressed in U.S. Dollars and the other thought it was expressed in Canadian Dollars. Cf. *The Confederate Note Case*, 86 U.S. 548, 557 (1873) (conditions in the South during Civil War created an ambiguity as to whether contracts priced in terms of "dollars" meant U.S. dollars or Confederate dollars; parol evidence was often needed to clarify the ambiguity). In the absence of evidence that would show actual agreement on the answer to the question, the court could enforce the alleged settlement here only by making a new "contract" for the parties.

The situation is comparable to that in *Baker O'Neal Holdings, Inc. v. Massey*, 403 F.3d 485, 487-89 (7th Cir. 2005), in which the parties signed a one-page handwritten agreement to sell a group of auto dealerships for a stated price of $300 million. Applying Michigan law, Bankruptcy Judge Metz, this court, and the Seventh Circuit found that the agreement was an unenforceable agreement to agree. There was no clear agreement as to what was being sold. All of Massey's interests in auto dealerships? Only his Cadillac dealerships? Dealerships of all brands, but only those dealerships he owned solely? Would land and buildings be included in the deal? Because there was no reliable answer to those questions (and others), the courts all found that even though the parties had signed a document they called an "agreement," they had not agreed on the material terms of the alleged contract. Without a basis for determining the scope of the override royalty mentioned on May 3rd, the same reasoning applies here.

Under other circumstances, perhaps, it might seem reasonable to resolve the dispute in this case by enforcing the terms that defendants themselves proposed. The problem with such an approach in this case is that time was of the essence in reaching an agreement. Defendants were strongly motivated to reach an agreement with Morabito in early May. Their dispute with him was an obstacle to another deal the defendants were seeking. When no deal was reached with Morabito by May 18th, the defendants lost interest in settling on the proposed terms. They withdrew their offer. Morabito clearly understood that time was of the essence in these negotiations. The parties' offers had short deadlines for acceptance. At this point, when it appears the other deal the defendants were seeking has met its fate, the defendants' motivation to pay anything approaching what Morabito was demanding has evaporated. It would be unjust to force defendants to abide now by terms that were acceptable to them only in the first half of May when they thought they needed to settle with Morabito to enable another deal to go forward.

Accordingly, plaintiff's motion to enforce settlement agreement (Docket No. 18) is hereby denied.

So ordered.

Date: June 29, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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